

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FAMILY DELI OF BELLMORE, INC.	:	DETERMINATION
	:	DTA NO. 810719
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1987	:	
through May 31, 1990.	:	

Petitioner, Family Deli of Bellmore, Inc., 2772 Sunrise Highway, Bellmore, New York 11710, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1987 through May 31, 1990.

A hearing was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 29, 1993 at 1:15 P.M., continued at the same location on August 24, 1993 at 9:15 A.M., continued at the same location on February 16, 1994 at 9:15 A.M., and continued to conclusion at the same location on February 17, 1994 at 9:15 A.M. Petitioner requested and was granted four extensions of time totalling four months to file a brief in this matter and filed its brief on August 1, 1994 and its reply brief on January 23, 1995. The Division of Taxation requested and was granted seven extensions of time totalling two months to file a brief in this matter. No brief was filed on behalf of the Division of Taxation. Petitioner appeared by Michael T. Lamberti, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether testimony given at a continued hearing based upon prior questioning in an earlier hearing should be admitted as evidence where such information was considered at the time of the audit without any such consideration being indicated in the record.

II. Whether the Division of Taxation made an adequate review of petitioner's books and records so as to justify the Division of Taxation's use of external indices as a basis for estimating additional sales tax for the three-year period at issue here, in lieu of an audit of petitioner's books and records.

III. Whether petitioner's books and records were insufficient to verify taxable sales receipts and to permit the Division of Taxation to conduct a complete audit so that the audit based on external indices was appropriate.

IV. Whether the sales tax field audit conducted by the Division of Taxation resulted in an audit method reasonably calculated to reflect sales and use taxes due.

V. Whether the Division of Taxation is estopped from relying upon the waiver of the statute of limitations thereby rendering a portion of the notice of determination time barred.

VI. Whether the notice of determination issued by the Division of Taxation lacked a rational basis and was issued to avoid the expiration of the statute of limitations.

VII. Whether petitioner has established by the introduction of clear and convincing evidence that there were errors in the sales tax field audit.

VIII. Whether petitioner has established reasonable cause and the absence of willful neglect to justify the abatement of penalties.

FINDINGS OF FACT

Petitioner, Family Deli of Bellmore, Inc., owns and operates a delicatessen located at 2772 Sunrise Highway in Farmingdale, New York. The delicatessen sold cold cuts, salads, dairy and grocery products, prepared foods, sandwiches, beer and soda. It was open seven days a week, 7 A.M. to 10 P.M., and was located in a shopping center at the intersection of two major cross streets.

John Short, Jr. was the sole owner and president of petitioner. His brother, Brian Short, was the secretary of the corporation while their father, John Short, Sr., was the vice-president of and accountant for the corporation.

The Division of Taxation ("Division") initially contacted petitioner by telephone about performing a sales and use tax audit for the period March 1, 1987 through November 30, 1989. By letter, the auditor requested that petitioner have available all books and records. Subsequent thereto, the parties agreed to commence the audit after the end of the tax season, on approximately April 17, 1990. During April 1990, a new auditor advised petitioner that the original auditor was no longer with the Division and that he would be conducting the audit, which was to commence on May 8, 1990.

On May 2, 1990, the new auditor mailed an appointment letter to petitioner requesting that all books and records pertaining to petitioner's sales and use tax liability for the period under audit were to be available on the appointment date. The books and records were to include journals, ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns and exemption certificates. The appointment letter stated the audit period to be May 31, 1987 through May 31, 1990. Attached to the appointment letter was a document entitled "Checklist of Records to be Presented for Audit". The list of records to be presented on audit included the following:

- General Ledger for audit period.
- Cash Receipts Journal for audit period.
- Cash Disbursements Journal for audit period.
- Federal Income Tax Returns for audit period.
- Sales Tax Returns and Worksheets for audit period.
- Merchandise purchase invoices for period: 11/30/90 QUARTER ENDING.

Sales invoices for period: 11/30/90 QUARTER ENDING.
Expense purchase invoices for period: 11/30/90 QUARTER ENDING.
Fixed asset purchase/sales invoices for entire audit period.
Bank statements for all accounts for the audit period.
All exemption documents supporting nontaxable sales for audit period.
Latest NYS Withholding Tax Return and cancelled check.
Latest NYS WRS-2 return and NYS Corporation Tax Return.
General Journal or Closing Entries that affect sales, sales tax, merchandise purchases or fixed asset accounts.

On the evening of May 7, 1990, the auditor cancelled the audit appointment for the next day. No reason was given nor was there a discussion concerning a rescheduled date. On June 12, 1990, the auditor telephoned Mr. Short, Sr., to set up an appointment date to commence the audit on June 21, 1990. On June 18, 1990 the auditor's team leader telephoned Brian Short about executing an extension of time to audit the quarters ended May 31, 1987 through February 29, 1988. In response, petitioner demanded that the audit begin immediately and a meeting was scheduled for June 20, 1990. The extension of time to audit the quarters ended May 31, 1987 through February 29, 1988 was executed by petitioner and returned to the auditor. However, the extension was executed for seven days, extending the period to June 27, 1990, not the one-year extension requested by the Division.

Petitioner had recently been involved in a sales and use tax audit for prior years involving the same auditor. It was the opinion of the officers of petitioner that the prior audit took too long and that some of the auditor's behavior was inappropriate. They were also concerned that several months had passed since the initial contact of the original auditor and the audit had not even started. According to petitioner's witnesses, the officers placed three conditions on the signing of the consent extending the period of limitation for the period March 1, 1987 through February 29, 1988: the auditor would do a complete audit of all the books and records; the auditor would report to the officers as to the status of the audit; and the auditor would complete the audit within three months. According to the Division's witnesses, no conditions were agreed to. In addition, the only written evidence of these conditions is on a request letter for an extension of time to assess. The conditions on the letter are, for the most part, illegible. Assuming that the conditions would be met, Brian Short executed the consent extending the

period of limitation to September 20, 1990.

On June 20, 1990, the auditor met with John Short, Sr., in the latter's office. Available for review were petitioner's sales tax returns and related worksheets, Federal and State income tax returns and related worksheets, depreciation schedules, cash register tapes, purchase journal, general ledger and journal entry sheets, cancelled checks and monthly bank statements, all for the entire audit period. The auditor determined, however, that the books and records were inadequate because the business operation did not utilize guest checks and the cash register produced cash register tapes that could only provide total sales, taxable sales and nontaxable sales but had no description of the item being sold. The business's "z" tapes indicated, among other things, the amount of sales tax collected. Based on this conclusion, the auditor did not look at any of the books and records of petitioner besides the few cash register tapes and decided that an observation test would be necessary to estimate the taxable sales of petitioner's delicatessen.

On July 11, 1990, the auditor left a second Checklist of Records to be Presented for Audit with Mr. John Short, Sr. The checklist was identical to the checklist mailed to petitioner on May 2, 1990 except that the requested period for the merchandise purchase invoices, the sales invoices and the expense purchase invoices had been changed to "3/1/87-5/31/90". The auditor's contact sheet indicates that on July 10, 1990 and July 11, 1990, the auditor reviewed the cash register tapes and other records in preparation for the observation test. The workpapers do not contain, however, any analysis of the business's cash register tapes.

On the morning of August 16, 1990, the auditor arrived at petitioner's business operation to conduct an observation test. None of the officers of the corporation had been previously advised that the auditor would be conducting such a test. The auditor was advised by petitioner that an observation test would not be allowed. Following several telephone calls between the auditor and petitioner's officers concerning the need to do an observation test and the expiration of the waiver on September 20, 1990, the auditor wrote Mr. John Short, Sr., on September 4, 1990 stating that since the auditor was not allowed to observe the operation, further analysis of

the business's records would be necessary. The letter requested that at the next appointment on or before September 10, 1990 petitioner should have available all cash register tapes for the audit period and all other information previously requested. New consents extending the period of limitations for assessment beyond September 20, 1990 were also enclosed.

John Short, Jr., and John Short, Sr., testified that quarterly meetings were held among the three officers in order to: determine gross sales in comparison to the cash register tapes; determine converted taxable sales; control employee error; watch for employee theft; track competition; and, maintain quality control.

To maintain internal controls, various operations manuals were used and worksheets were completed on a quarterly basis. In the area of converted prepared foods, six different categories were used. The first category was provisions. The operations manual called for preslicing sandwich meats in quarter pound lots in the morning. Since this quarter pound amount is placed in each sandwich, it was possible to determine how much of the provisions bill was going into sandwiches. The total number of sandwiches sold was multiplied by the average price of a sandwich to arrive at a gross figure for sandwiches prepared.

To analyze dairy goods, eggs were used because they were purchased in bulk and the number used in an egg sandwich is known, resulting in the number of egg sandwiches made. This was cross-checked with the paper goods order which indicated the amount of sheets of 12 x 15 dry wax which was purchased within a quarter. One sheet was used to wrap one egg sandwich.

In dairy, the purchase of butter was analyzed. The business knew it obtained 24 buttered rolls or bagels out of each package of butter, so it multiplied packages of butter times 24, yielding the number of rolls or bagels sold. This was also cross-checked with the paper order as the business purchased pop-up dry wax specifically to wrap rolls and bagels.

The amount of cups of coffee sold in a quarter was arrived at by multiplying the number of packs used times the number of cups obtained per pack, eight. This was also cross-checked with the amount of styrofoam coffee cups purchased within the quarter.

The amounts of soup and salads that were sold in a quarter were determined by reviewing the number of bowls and number of quarter-pound cups purchased during that particular time period.

For each of the six areas - provisions, dairy goods, grocery goods, soup, salads and bagels - petitioner multiplied the amount of goods sold times the average retail selling price to arrive at the gross sales for each area. The items which were always taxable - beer, soda, cigarettes, candy - utilized the same computation of amount purchased per the invoices times the average retail selling price to determine gross sales. Total gross taxable sales were determined by adding the total converted, prepared foods and the total always taxable. This figure was compared to the taxable sales figure on the cash register tape and the higher of the two was used as taxable sales on the sales and use tax return. In addition, the amount of sales tax due per the taxable sales computed was compared to the sales tax collected on petitioner's "Z" tape to insure the proper payment of sales tax was being paid to the Department of Taxation and Finance.

Mr. John Short, Sr., developed the accounting system used by petitioner. Its purpose was to account for the cash that came into the business, to maintain purchase control over the products bought for resale or consumption and to maintain control over the bank reconciliation procedures for money deposited. These controls were maintained in an operations manual kept for review by the officers of the business operation.

After deciding that the records were inadequate to perform a complete audit and being refused an opportunity to do an observation test, the auditor decided to pursue other external indices to determine petitioner's sales tax liability. There are three areas of the overall audit that arrived at the amount at issue.

The first area reviewed by the auditor was taxable purchases. He used the business's records, listing the purchases by category. From this list he extracted those items which are always taxable when sold to customers, a total of \$285,234.00, and compared that to total purchases of \$1,005,231.00. This yielded a taxable purchase ratio of 28.37 percent.

The next area involved an erroneous overcollection of sales tax on a nontaxable item. On

one of the occasions that petitioner would not allow an observation test, two auditors entered the business premises and purchased lunch for a total of \$9.15. The clerk in the delicatessen charged sales tax on a bottle of Veryfine apple juice, a nontaxable item. The erroneous collection on the \$.80 item divided by the total sale of \$9.15 yielded an error rate of 8.74 percent.

The final area involved the determination of a percentage of converted prepared foods to total gross sales. The auditor reviewed four delicatessen observation test audits performed in Nassau County to make the determination. The four delicatessens were chosen because they had similar hours, gross sales, locations, items sold (product mix), audit periods and traffic patterns. In addition, they were closest in time to the audit at issue. Some relevant information relating to the four delis is as follows:

<u>Delis</u>	<u>Audit Period</u>	<u>Audited Gross Sales</u>	<u>Length of Audit Period</u>	<u>Annual Gross Sales</u>	<u>Overall Taxable Ratio</u>
Deli #1	6/1/84 - 2/28/87	\$1,077,971.00	2.75 years	\$391,989.00	74.9%
Deli #2	6/1/83 - 11/30/86	\$1,768,771.00	3.5 years	\$505,363.00	53.6%
Deli #3	3/1/85 - 11/30/87	\$1,990,249.00	2.75 years	\$723,726.00	57.7%
Deli #4	3/1/85 - 2/28/88	\$1,255,818.00	3.0 years	\$418,606.00	48.9%
Family Deli	3/1/87 - 5/31/90	\$1,801,659.00	3.25 years	\$554,356.00	---

The average annual gross sales for Delis #1-4 was \$509,921.00. All the Delis on the list were located in shopping centers except Deli #1. The average of taxable prepared foods of Delis #1-4 was 45.6%.

Although not used in the audit, the auditor had available a list of 34 delicatessens located in Suffolk County that had been audited by the Suffolk County District Office. The delicatessens had an average overall taxable ratio of 53.87 percent. In addition, the auditor had testified that it was his experience that delicatessens generally have overall taxable ratios of between 60 and 70 percent.

The auditor first arrived at an audited taxable percentage by adding together the three components of the audit:

Converted prepared foods	45.6 %
Erroneous collections	8.74%

Always taxable sales	<u>28.37%</u>
Audited taxable percentage	82.71%

The audited taxable percentage was multiplied by the gross sales reported of \$1,801,659.00 to arrive at audited taxable sales of \$1,490,152.16. The auditor then subtracted taxable sales reported of \$572,626.00 to compute additional taxable sales of \$917,526.16 to which was applied the tax rate of 8 percent to determine additional tax due of \$73,402.09. Penalties were assessed based upon the tax omission's being greater than 25% of audited tax due for the audit period.

On September 17, 1990, the Division issued to petitioner, Family Deli of Bellmore, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1987 through May 31, 1990 assessing a liability of \$73,402.09, plus penalty and interest. On the same date, the Division issued to petitioner an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the same period assessing a penalty liability in the amount of \$7,340.22, pursuant to Tax Law § 1145(a)(1)(vi).

During the initial hearing date of April 29, 1993, petitioner's representative questioned the auditor concerning the four audits used to compute petitioner's tax liability. The auditor was not familiar with the audits other than that information contained in his workpapers. During the time between the first and second hearing dates, the auditor reviewed the files relating to the four audits. On the second hearing date, the auditor testified by direct examination as to the details surrounding the four audits.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices. However, the Division may not utilize external indices unless it first determines that the taxpayer's books and records are inadequate for purposes of verifying sales and purchases subject to sales and use taxes (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43). If the taxpayer's records are inadequate, the

Division must then select a method of audit reasonably calculated to reflect taxes due (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221), and the burden is on the taxpayer to establish by clear and convincing evidence that the method used to arrive at the tax assessment and the assessment are erroneous (Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542, 543). Furthermore, the Tax Appeals Tribunal has noted that:

"[w]here the taxpayer establishes that the audit methodology is based on an assumption that is fundamentally flawed, the taxpayer has sustained his burden of proof and is not required to show the exact amount of taxes due [citations omitted]" (Matter of Bernstein-On-Essex, Tax Appeals Tribunal, December 3, 1992).

B. To determine the adequacy of a taxpayer's records, the Division must first request and thereafter thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of King Crab Restaurant v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978). The purpose of this examination is to determine whether the taxpayer's books and records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commn., supra; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989). Where the Division follows such steps, it then may resort to external indices to estimate tax.

C. In the present matter, the auditors made a proper request for petitioner's books and records. The initial auditor made a written request in January 1990, the second auditor made a written request accompanied by a checklist in May 1990 and that second request was corrected in July 1990. Petitioner supplied the auditor with all the records requested and additional records as well. Upon seeing that the cash register tapes did not designate the item sold, the auditor concluded that the books and records were inadequate. All the other records maintained by petitioner and requested by the auditors were not reviewed.

There was no evidence or testimony presented to support the conclusion that there was a thorough examination of the taxpayer's books and records (Matter of King Crab Restaurant v.

Chu, supra) to determine through verification drawn independently from within these records (see, Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255; Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208; Matter of Urban Liqs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138), that they are, in fact, so insufficient that it is "virtually impossible [for the Division] to verify taxable sales receipts and conduct a complete audit" (Matter of Chartair, Inc. v. State Tax Commn., supra) "from which the exact amount of tax can be determined" (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759). The auditor had several opportunities to review the records maintained by petitioner but failed to do so. It is noted that the facts and circumstances in this matter are unlike those in Matter of Clone Enterprises (Tax Appeals Tribunal, March 19, 1992) where there was a studied disregard of requests for records by the taxpayers.

It is observed that the Division was required to review petitioner's books and records for purposes of determining their adequacy prior to the issuance of the statutory notices, which were based on an estimation of sales. As a result, the statutory notices, which were based upon an estimate of taxable sales may not be sustained (see, Matter of Arper Discount Center, Tax Appeals Tribunal, June 27, 1991). It is also noted that the situation at hand is unlike the circumstances in Matter of Morano's Jewelers (Tax Appeals Tribunal, January 21, 1991 [wherein the Tribunal noted that the taxpayer could not refuse to allow the Division further access to its books and records and that there was no obligation upon the Division "to follow alternative means to access such records"])). In the matter at hand, petitioner never, in fact, refused to allow the Division access to its books and records.

D. The Tax Appeals Tribunal, in Matter of Bleistein (August 11, 1994), noted that Administrative Law Judges may not "moot" issues and directed the analysis of all issues raised by the parties in the administrative hearing. Consequently, the remaining issues will be addressed.

E. Every person required to collect sales tax must maintain records sufficient to verify all

transactions, in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). As previously noted, petitioner did not maintain cash registers which produced tapes showing the specific nature of individual transactions. As a result, individual sales transactions were not subject to independent review and verification. Consequently, the Division could properly resort to methodologies for estimating petitioner's taxable sales (see, Oak Beach Inn Corp. v. Wexler, 158 AD2d 785, 551 NYS2d 375; Matter of Del's Mini Deli, Tax Appeals Tribunal, April 18, 1993).

F. Although the Division may resort to methodologies in estimating petitioner's taxable sales, there is no presumption of correctness that attaches to the audit unless there is an initial showing that the methodology selected was reasonably calculated to reflect the tax due (Matter of Fashana, Tax Appeals Tribunal, September 21, 1989). "[C]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist" in each case; however, certain limitations have been placed on this principle (Matter of Basileo, Tax Appeals Tribunal, May 9, 1991, quoting Matter of Grecian Square v. State Tax Commn., *supra*). Although exactness in the outcome of the audit method is not required (Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177, *affd* 44 NY2d 684, 405 NYS2d 454; Matter of Lefkowitz, Tax Appeals Tribunal, May 3, 1990; see, Matter of Pizza Works, Tax Appeals Tribunal, March 21, 1991), the record nonetheless must contain sufficient evidence to allow the trier of fact to determine whether the audit had a rational basis (Matter of Basileo, *supra*, citing Matter of Grecian Square v. State Tax Commn., *supra*; see, Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991; Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990); that is, the record must contain certain specific information identifying the external index employed by the Division in estimating the taxpayer's liability (Matter of Fashana, *supra*; Matter of Fokos Lounge, *supra*).

Once this threshold determination is made, the burden then rests upon petitioner to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679;

Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451).

However, if the Division, through witnesses or documents, is unable to respond meaningfully to inquiries concerning the nature of the audit performed, it may be found that a taxpayer has been deprived of the opportunity to meet his or her burden of proving that the audit methodology is unreasonable (Matter of Basileo, *supra*, citing Matter of Fokos Lounge, *supra*).

G. Here, petitioner's books and records were incomplete and unreliable for determining accurate sales, and the Division elected to perform an observation test to determine any sales or use tax liability. However, petitioner would not allow the auditors to perform such a test until a complete audit was performed. Therefore, the auditor decided to base the audit upon audits performed of four other delicatessens, an overcollection error rate and petitioner's purchases of always taxable items. The four delicatessens were chosen, among other factors, because of their location, size and product mix. This is a reasonable method when faced with the inability to do an observation test. However, petitioner has shown that two aspects of the audit are unreasonable. The first aspect is the taxable ratio used by the Division in its computation. The auditor testified that in his experience the taxable ratio for delicatessens in Nassau County was in the range of 60 to 70 percent. A document made part of the record indicated that the Suffolk District Office had analyzed 34 delicatessens and found that the average taxable ratio was 53.87%. Finally, one of the main factors used in selecting the four delicatessens was their similar location to petitioner's; that of being in a shopping center on a major thoroughfare. However, Deli #1, with a taxable ratio of 74%, was not situated in a shopping center and its taxable ratio was higher than the auditor's experience, the Suffolk County average and the three other delicatessens.

The second aspect is the overcollection percentage. Petitioner stated that the cash register tapes would contain the taxable totals for each day and that pursuant to the quarterly reviews the amount remitted to New York State would be the higher of the amount determined by the "z" tape or the control worksheets. In either case, the money would have been remitted to the State.

Therefore, Deli #1 and the overcollection error rate are to be removed from the

calculation of additional tax due. In addition, the average overall taxable ratio of Delis #2-4 (53%) is to be used in such calculation.

H. Petitioner maintains that the waiver of the statute of limitations executed on June 20, 1990 and extending the period to September 20, 1990 is null and void because the Division failed to meet three absolute conditions upon which the waiver was premised. Petitioner is asking that the doctrine of estoppel be applied to prevent the Division from relying on the waiver. In rare instances, it may be appropriate to apply the doctrine of estoppel to governmental acts, but it is an exceptional remedy which must be applied with great restraint (Matter of Sheppard-Pollack, Inc. v. Tully, 64 AD2d 296, 409 NYS2d 847; Matter of Eastern Tier Carrier Corp., Tax Appeals Tribunal, December 6, 1990). The basic elements which would justify the application of an estoppel were not established by petitioner.

Petitioner did not establish that the Division made an explicit promise that would cause a reasonable person to believe that the three conditions would be met in conducting the audit (cf., Matter of Eastern Tier Carrier Corp., supra [where, in response to the taxpayer's request for a conference, the Division sent a letter to the taxpayer stating that a conference would be held following the issuance of a notice of deficiency and later denied a conference on the ground that it was not requested timely]). Petitioner offered the testimony of two of its officers that the waiver was signed as a result of the Division's agreeing to the three conditions. It also introduced a copy of a letter requesting an extension with the claimed three conditions. The conditions on the letter are, in general, illegible. The Division offered the testimony of two auditors that no conditions were attached to the execution of the waiver. Absent clear evidence of explicit statements by a Division employee to serve as a basis for petitioner's conclusion, there are no grounds for an estoppel.

I. Petitioner asserts that the Division issued a notice of determination for the sole purpose of procuring an extension of time and that there is no basis for the Division's determination of the amount of tax due.

Although the auditors were concerned that the statute of limitations on the first and

second quarters at issue (March 1, 1987 - August 31, 1987) would expire absent a validly executed consent from petitioner, the assessment at issue herein was based upon information (the audits of Delis #1-4, the overcollection error rate and petitioner's always taxable purchases). This is clearly distinguishable from the facts in Brown v. New York State Tax Commn. (199 Misc 349, 99 NYS2d 73, affd 279 App Div 837, 109 NYS2d 626, affd 304 NY 651), wherein the court determined that the State Tax Commission exceeded its statutory authority in issuing the assessment which was not based upon any information and was totally fictitious. The court found that the assessment was apparently served to procure an extension of time for the Commission to make a valid determination of additional tax due. Such is not true in the present matter.

J. Petitioner went through great lengths to maintain complete and extensive records in an effort to ascertain its proper sales tax liability. These books and records were made available to the Division. The auditor accepted both the gross sales and purchases as reported by petitioner. The books and records reconciled with the Federal income tax returns and the sales and use tax returns. In addition, petitioner timely filed its sales and use tax returns and paid all sales tax when due during the audit period. As a result, all penalties should be waived.

K. During the first day of hearing, petitioner's representative cross-examined the auditor about the four delicatessens used in the audit. The auditor was unable to answer with any detail, if at all, the questions of the representative. On the second day of hearing, the auditor, on redirect, following a review of the audit files of the delicatessens, answered all the questions. Petitioner contends that the later testimony of the auditor should be held inadmissible.

The reasons presented by petitioner as to why the testimony should be held inadmissible generally go to the weight to be given the testimony, and not to its admissibility. Such reasons, although not discussed herein, were considered in reviewing the auditor's testimony in total. As for the particular testimony at issue, it seems that the Division had an obligation to provide an explanation of the audit and as much information about the audit as it was able. This is what it was attempting to do. Secondly, the information provided was in direct response to questions

asked by petitioner. If such information was not desired by petitioner to be a part of the record, such questions should not have been asked. Finally, without the information supplied by the auditor's testimony, petitioner would have been denied the opportunity to knowledgeably challenge the audit methods and findings.

L. The petition of Family Deli of Bellmore, Inc. is granted and the notices of determination dated September 17, 1990 are cancelled.

DATED: Troy, New York
July 20, 1995

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE